No. 87-628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. BRANCH,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. The most notable position taken by respondents in their Opposition to the Petition For Writ of Certiorari is no position—they expressly refuse to defend the constitutionality of section 315. (Opp. 20 n.10) Indeed, respondents "agree with petitioner that the Commission's decision in *Syracuse Peace Council* provides the "signal" of a change in the media environment to which this Court referred in *League of Women Voters*." (Opp. 20) But respondents ask this Court not to defer to the Federal Communications Commission's ("Commission's") "comprehensive study of the fairness doctrine" (Opp. 18) until its "findings have . . . been reviewed by the court of appeals." (Opp. 22) On the other hand,

respondents ask the Court to defer to its judgment in matters of statutory interpretation. (Opp. 14-15) This confusion about the relative deference due the Commission precisely reverses the appropriate standard of review: courts should accord great weight to the Commission's investigations of fact, *Meredith Corp. v. FCC*, 809 F.2d 863, 871 (D.C. Cir. 1987), but need not "rubber stamp" its statutory interpretations. *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Under the proper standard, respondents' statutory interpretation fails to obscure the plain meaning of section 315 exemptions and the Commission's factual findings provide a basis for reviewing the law's constitutionality.

2. a. Respondents' interpretation of section 315 is flawed by an excessively narrow view of the congressional purpose underlying the 1959 amendments. Branch is not covered by the newscast exemption, respondents assert, because the amendments were adopted only to restore the law prior to the Commission's decision in *CBS, Inc.*, 18 Rad. Reg. (P&F) 238 (1959) ("*Lar Daly*"). (Opp. 10-11) This reading of the amendments overlooks Congress' broadly remedial purpose to preserve broadcasters' independent editorial judgment. (Pet. 11-12) It also ignores over ten years of administrative and judicial interpretation of the amendments which expressly repudiated such a crabbed view.[1]

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[1]The Commission fashioned the newscaster candidate rule at a time when it was applying an exceedingly restrictive view of the amendments' scope. *See Use of Station by Newscaster Candidate*, 40 F.C.C. 433 (1965) ("*WMAY*"). Beginning in the mid-1970s, however, it systematically reconsidered the legislative history of the amendments and concluded that its earlier, narrow interpretations had been mistaken. *E.g.*, *Aspen Institute Program on Communications & Society*, 55 F.C.C.2d 697 (1975), *aff'd sub nom. Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) (reversing statutory analysis of ten years' duration). Specifically, the Commission concluded that its understanding of the statutory purpose as expressed in cases decided during the mid-1960s was too limited and that broadcasters editorial discretion should be maximized. *Chisholm*, 538 F.2d at 356-64; *See Office of Communication of the United Church of Christ v. FCC*, 590 F.2d 1062 (D.C. Cir. 1978). *See also Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd sub nom. League of Women Voters Education Fund v. FCC*, 731 F.2d

b. Although respondents (quoting the court below) acknowlege that "Congress may have done more than reverse *Lar Daly*," they assert—without a credible basis—that licensees' "broad editorial discretion" is limited to "choosing which *newsworthy events* to present to the public." (Opp. 11-12 n.4) (emphasis in original). But this argument is predicated on the unsupported assumption that the selection of a particular reporter for a story is not in itself "newsworthy" and is not a product of editorial discretion. It is difficult to name a more fundamental act of editorial discretion than assigning stories to reporters. This Court has held that the Communications Act will not permit embroiling the Commission in "the day-to-day editorial decisions of broadcast licensees," among which is "their control over the selection of voices." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 116, 120 (1973). With respect to the section 315 exemptions, the Commission ruled that "on-the-spot coverage of bona fide news events" applies both to "acts of gathering and disseminating news." *Henry Geller*, 95 F.C.C.2d at 1243. Respondents offer no persuasive reason why Branch's acts of disseminating the news in the context of a newscast are not likewise exempt.[2]

c. Respondents seek to avoid a split in the circuits by the unsupported assertion that the "Fifth Circuit would [not] adhere to the interpretation of the statute adopted in *Brigham* [*v. FCC*, 276 F.2d 828 (5th Cir. 1960)] without first reconsidering the matter." (Opp. 16) This argument is predicated on the

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995 (D.C. Cir. 1984); *Kennedy for President Committee v. FCC*, 636 F.2d 417 (D.C. Cir. 1980). Based on a thorough reading of the legislative history, these decisions confirm that the amendments reach far beyond the narrow confines of *Lar Daly*.

[2]Congress undoubtedly was interested in promoting the coverage of political events, but respondents point to no credible evidence showing that Congress wished to suppress other aspects of editorial discretion. Quoting the court below (App. 18a), respondents allege that a literal interpretation of section 315 would "raise a station's news employees to an elevated status not shared by any of its other employees. . . ." (Opp. 13 n.5) But this statement provides no reason to discount congressional intent to promote editorial discretion in *news* programs.

assumption, shared by the court below, that the Commission revised its approach to newscaster candidates in 1965 after fully evaluating the legislative history and that it has consistently applied section 315 to newscaster candidates ever since. (Opp. 14-16) But this characterization is misleading. The court in *Brigham* held that the newscaster's appearances were exempt because there was no suggestion of favoritism and "his employment is not something arising out of the election campaign, but, rather, is a 'regular job.'" 276 F.2d at 830. In contrast, the 1965 *WMAY* decision involved a broadcast station's news director, who controlled the newscast's "format and production." 40 F.C.C. at 433. Although the opinion contained dictum relating to station employees in general, the Commission stressed that its decision was "strictly limited to the facts." *Id.* at 434. Thus, the factual distinctions between *Brigham* and *WMAY*—not a closer examination of the legislative history as respondents now suggest—explains the different results. The Commission confirmed this interpretation in a policy statement reaffirming *Brigham* less than a year after the *WMAY* decision. *See Use of Broadcast Facilities by Candidates for Public Office*, 3 F.C.C.2d 463, 472-73 (1966). The Commission's contemporaneous interpretations indicate that *WMAY* did not "overrule" *Brigham*, thus removing any basis for respondents' suggestion that the split in the circuits has vanished.[3]

3. a. Respondents apparently agree that this Court should reassess the constitutional basis of broadcast regulation. But after detailing the Commission's findings regarding the abundance of media outlets and the chilling effect of the fairness doctrine (Opp. 18-20), respondents urge the Court to await "further factual development or analysis."[4] (Opp. 22)

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[3]In any event, the *WMAY* facts are inapplicable to Branch. Like the newscaster in *Brigham*, Branch is not part of station management and is not in control of the "format and production" of his assignments. (App. 3a) He merely presents stories as part of his "regular job," and it has never been suggested that KOVR has engaged in favoritism on his behalf.

[4]Respondents do not dispute the incontrovertable relevance to this case of the Commission's findings in the fairness doctrine proceedings.

What is missing from this argument is any indication of how a reviewing court could improve on the Commission's factfinding ability.[5] In its 1985 fairness doctrine inquiry, the Commission received formal written comments from more than one hundred parties and informal comments from many others. The Commission also held hearings in which it heard oral presentations. *General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 146 (1985). It reopened the record in *Syracuse Peace Council*, 2 FCC Rcd 5043, 5058 (1987), and received additional comments from more than fifty parties. At the same time, the Commission examined alternative methods of enforcing fairness doctrine obligations, and received comments from "broadcast licensees, broadcast networks, public interest groups and others." *Inquiry Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 2 FCC Rcd 5272, 5276 (1987). The Commission concluded that "the best alternative . . . continues to be an unregulated 'free marketplace of ideas.'" *Id.* Even before the Commission embarked on its extended analysis of the media environment, the one reviewing court to examine the 1985 fairness doctrine inquiry described its conclusions as "carefully documented and reasoned" and the Commission's failure to act on its findings "the very paradigm of arbitrary and capricious administrative action." *Meredith Corp.*, 809 F.2d at 867, 874. Respondents offer no plausible excuse for the Court to ignore these extensive findings from the Commission's reported decisions.

b. Respondents incorrectly assume that the fairness doctrine proceedings have been the only "signal" which the Court may consider.

i. The court below found that the speech of station KOVR and William Branch were chilled by political broadcasting regulations and concluded that "we do not believe the issues would be refined by any further development of

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[5]For example, it is unclear to what extent "further factual development or analysis" would result in a different talley of the number of broadcast outlets or new video technologies.

these facts." (App. 5a–7a) Contrary to respondents' callous assertion that Branch "has not suffered any sanction," the court below recognized that "'loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.'" (App. 5a, quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). Respondents further belittle Branch's First Amendment deprivation as being "of little practical importance" because "this is the first case in which the issue has arisen in more than 20 years." (Opp. 16 n.7) But the Commission conducted its inquiry in *WMAY* because of "the frequency with which these situations have arisen." 40 F.C.C. at 434. The extent to which such cases have ceased is merely evidence of section 315's chilling effect.

ii. As the "expert agency" with "more than fifty years of experience with the day-to-day implementation of communications regulation," *Syracuse Peace Council*, 2 FCC Rcd at 5046, the Commission recommended that Congress repeal section 315.[6] (Pet. 18) The Commission reported that during a 1960 moratorium on enforcement, "substantial amounts of time were provided by the networks to the candidates 'in good viewing hours without charge.'"[7] The Commission also noted that "relaxation of equal time restrictions has resulted in the provision of increased amounts of information to the electorate by the broadcast media." *1986 Legislative Proposals* at 928. For example, after the Commission reversed its longstanding interpretation of section 315 (in 1983) to allow broadcast stations to host candidate debates,[8] 45 percent of television stations in 1984 offered to sponsor debates for local, state and federal candidates (in addition to regular news coverage), and in 1986 the number of

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[6]Federal Communications Comm'n, *Legislative Proposal*, 927 (January 30, 1986) ("*1986 Legislative Proposals*").

[7]*Id.*, quoting Report to the Congress submitted pursuant to S.J. Res. 207, 86th Cong., 2–3 (March 1, 1961).

[8]*Henry Geller*, 95 F.C.C.2d at 1242-46.

stations making the same offer rose to 56 percent.[9] Conversely, the continuing existence of section 315 acts as a damper on such programming.

iii. The Commission is not alone in advising Congress that the scarcity rationale underlying broadcast regulation may now be obsolete. *See* U.S. Congress, Office of Technology Assessment, *Science, Technology and the First Amendment*, OTA-CIT-369 (Washington, DC: U.S. Govt. Printing Office, January 1988) at 28.

There is ample evidence by which this Court may well conclude that broadcast regulation should be reevaluated. Respondents do not disagree. But respondents counsel the Court to wait for another day even while acknowleging that the day may never come. (Opp. 21-22) In the meantime, the Commission's findings, both with respect to the fairness doctrine and section 315, reveal an on-going abridgement of broadcasters' First Amendment rights. The Court should resolve this intolerable situation, as it pledged to do in *Red Lion*.

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[9] *1986 Legislative Proposals* at 928. *See* Campaign Finance: Hearings Before the Subcommittee on Elections, Committee on House Administration, 100th Cong. 1st Sess. 687-88 (1987) (Statement of Edward O. Fritts, President, National Ass'n of Broadcasters). *See also* Allina and Geller, *The Equal Time Rule Suppresses Political Debate*, THE WASHINGTON POST, May 21, 1987.

Conclusion

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

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